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5 UNITED STATES DISTRICT COURT
6 CENTRAL DISTRICT OF CALIFORNIA
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8 THERESA ANNETTE TORRICELLAS,) Case No. EDCV 10-0573-DDP(RC)
9 aka NANCY MONTGOMERY,)
10 Petitioner,)
11 vs.) (1) OPINION AND ORDER ON A
12) PETITION FOR HABEAS CORPUS; AND
13 GUIERMO GARCIA, CIW WARDEN,) (2) ORDER DENYING
14 AND ATTORNEY GENERAL OF THE) CERTIFICATE OF APPEALABILITY
15 STATE OF CALIFORNIA,)
16 Respondents.)
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18 On April 9, 2010, in the United States District Court for the
19 Southern District of California, petitioner Theresa Annette
20 Torricellas, aka Nancy Montgomery, a state inmate proceeding pro se,
21 filed a habeas corpus petition under 28 U.S.C. § 2254, challenging the
22 California Board of Parole Hearings' 2008 denial of parole to
23 petitioner, and a motion for stay and abeyance of the proceeding so
24 petitioner can exhaust her claim in state court. On April 16, 2010,
25 the petition and motion were transferred to this district court.
26

27 **DISCUSSION**

28 A California prisoner seeking federal habeas corpus relief must
exhaust her claims before the California courts prior to filing her
petition for a writ of habeas corpus in federal court. 28 U.S.C.
§§ 2254(b) and (c); Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct.

1347, 1349, 158 L. Ed. 2d 64 (2004); O'Sullivan v. Boerckel, 526 U.S.

1 838, 842, 119 S. Ct. 1728, 1738, 144 L. Ed. 2d 1 (1999); Peterson v.
 2 Lampert, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc). "The
 3 exhaustion-of-state-remedies doctrine, now codified [at] 28 U.S.C.
 4 §§ 2254(b) and (c), reflects a policy of federal-state comity, an
 5 accommodation of our federal system designed to give the State an
 6 initial opportunity to pass upon and correct alleged violations of its
 7 prisoners' federal rights." Picard v. Connor, 404 U.S. 270, 275, 92
 8 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971) (internal quotation marks,
 9 citations and footnote omitted); O'Sullivan, 528 U.S. at 844-45, 119
 10 S. Ct. at 1732; Crotts v. Smith, 73 F.3d 861, 865 (9th Cir. 1996).
 11 "The exhaustion doctrine is principally designed to protect the state
 12 courts' role in the enforcement of federal law and prevent disruption
 13 of state judicial proceedings." Rose v. Lundy, 455 U.S. 509, 518, 102
 14 S. Ct. 1198, 1203, 71 L. Ed. 2d 379 (1982).

15
 16 Here, petitioner acknowledges her claim has not been exhausted
 17 before the California Supreme Court, Petition at 6, and she seeks an
 18 order staying this action while she exhausts her claim before the
 19 California Supreme Court, where she recently filed a habeas petition.
 20 See Declaration of Theresa Torricellas ¶¶ 15-17. Thus, the pending
 21 petition is completely unexhausted and must be dismissed without
 22 prejudice. See Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
 23 2006) ("Once a district court determines that a habeas petition
 24 contains only unexhausted claims, it need not inquire further as to
 25 the petitioner's intentions. Instead, it may simply dismiss the
 26 habeas petition for failure to exhaust." (citing Jiminez v. Rice, 276
 27 F.3d 478, 481 (9th Cir. 2001), cert. denied, 538 U.S. 949 (2003)); see
 28 also Muhammad v. Close, 540 U.S. 749, 751, 124 S. Ct. 1303, 1304, 158

1 L. Ed. 2d 32 (2004) (per curiam) ("Federal petitions for habeas corpus
 2 may be granted only after avenues of relief have been exhausted.");
 3 Davis v. Silva, 511 F.3d 1005, 1008 (9th Cir. 2008) (same).

4
 5 Although district courts have the authority to stay a mixed or
 6 completely exhausted habeas petition, see Rhines v. Weber, 544 U.S.
 7 269, 276-77, 125 S. Ct. 1528, 1534-35, 161 L. Ed. 2d 440 (2005); King
 8 v. Ryan, 564 F.3d 1133, 1135 (9th Cir.), cert. denied, 130 S. Ct. 214
 9 (2009), "that rule" has not been extended "to the situation where the
 10 original habeas petition contain[s] only unexhausted claims. . . ."
 11 Raspberry, 448 F.3d at 1154; see also Davis v. Adams, 2010 WL 1408290,
 12 *2 (C.D. Cal.) ("The Court cannot stay a completely unexhausted
 13 petition."), adopted by, 2010 WL 1408292 (C.D. Cal.); Burns v.
 14 Marshall, 2010 WL 1233779, *2 (C.D. Cal.) ("Although this Court has
 15 the power to stay a 'mixed' petition, or a fully exhausted petition,
 16 it does not have the authority to stay a petition that is completely
 17 unexhausted." (citations omitted)), adopted by, 2010 WL 1233777 (C.D.
 18 Cal.). Therefore, petitioner's request to stay this proceeding must
 19 be denied. Jones v. McDaniel, 320 Fed. Appx. 784, 786 (9th Cir.),
 20 cert. denied, 130 S. Ct. 210 (2009); Raspberry, 448 F.3d at 1154;
 21 see also Jiminez, 276 F.3d at 481 ("[T]he district court was 'obliged
 22 to dismiss immediately,' as the petition contained no exhausted
 23 claims" (citation omitted)).

24
 25 Rule 4 of the Rules Governing Section 2254 Cases in the United
 26 States Courts provides that "[i]f it plainly appears from the petition
 27 and any exhibits that the petitioner is not entitled to relief in the
 28 district court, the judge must dismiss the petition . . . ," and Local

1 Rule 72-3.2 similarly provides that "[t]he Magistrate Judge promptly
2 shall examine a petition for writ of habeas corpus, and if it plainly
3 appears from the face of the petition and any exhibits annexed to it
4 that the petitioner is not entitled to relief, the Magistrate Judge
5 may prepare a proposed order for summary dismissal and submit it and a
6 proposed judgment to the District Judge." Thus, this action should be
7 summarily dismissed without prejudice. Rasberry, 448 F.3d at 1154;
8 Jiminez, 276 F.3d at 481.

9
10 Further, this Court finds any appeal would not be taken in good
11 faith, and petitioner has not made a substantial showing that this
12 Court is not correct in its procedural ruling, and that petitioner has
13 been denied a constitutional right, for the reasons set forth herein.
14 Accordingly, a certificate of appealability should not issue under 28
15 U.S.C. § 2253(c)(2) and Fed. R. App. P. 22(b). Slack v. McDaniel, 529
16 U.S. 473, 483, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000); Cooper
17 v. Calderon, 308 F.3d 1020, 1021-22, n.2 (9th Cir. 2002), cert.
18 denied, 538 U.S. 984 (2003).

19
20 **ORDER**

21 IT IS HEREBY ORDERED that petitioner's motion to stay this action
22 be DENIED.

23
24 IT IS FURTHER ORDERED that Judgment be entered DISMISSING WITHOUT
25 PREJUDICE the petition for writ of habeas corpus and action.

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1 IT IS STILL FURTHER ORDERED that a Certificate of Appealability
2 be DENIED.

3
4 DATE: May 28, 2010



DEAN D. PREGERSON
UNITED STATES DISTRICT JUDGE

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6 PRESENTED BY:

7 DATE: May 20, 2010

8 /S/ Rosalyn M. Chapman
9 ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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